No. 521

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

MORRIS SHURIN,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Morris Shurin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered herein on November 10, 1947.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, Title 28 U. S. C., section 347 (a), and under Title 18 U. S. C. sections 687, 688, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 37 (b).

By its order this Court extended petitioner's time to file petition for writ of certiorari herein, to January 9, 1948 (Rule 37 (b) of the Rules of Criminal Procedure).

Opinions Below

The opinion of the Circuit Court (Parker, Soper, and Dobie, Circuit Judges) has not yet been officially reported.

The only opinion in the District Court appears in the text of "Order Denying Motion to Transfer" (8-9).[1] It was written by the District Judge in denying petitioner's motion to transfer the trial from North Carolina to New York (4-6). The petitioner's renewed motion to transfer (10-11) was denied without opinion (12).

Statement of the Matter Involved

The judgment of the Circuit Court, review of which by this Court is sought herein, affirmed a judgment convicting the petitioner of violating section 11 of the Selective Training and Service Act of 1940 (section 311 of Title 50 U. S. C. Appendix) after trial before Honorable Johnson J. Hayes, District Judge, and a jury in the United States District Court for the Middle District of North Carolina (Greensboro Division). Petitioner was sentenced to imprisonment for a term of eighteen months (198).

Petitioner was tried upon an indictment consisting of three counts. The first, upon which he was convicted, alleged that petitioner evaded service in the armed forces

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1 All parenthetical numerical references, in the petition and brief, unless otherwise stated, are to pages in the petitioner's printed appendix to his brief in the Circuit Court. (Appellant's appendix.)

by the making of false statements in an occupational affidavit dated January 10, 1944 (1-2). The second and third counts, of which petitioner was acquitted, alleged false statements in occupational affidavits dated respectively March 24, 1945 and June 11, 1945 (2-3).

The Circuit Court's Error in Construing the Meaning of "Manufacturer" and "Manufacture" Is Directly Contrary to *Carbon Steel Company* v. *Lewellyn*, 251 U. S. 501

The only serious question of fact for determination was whether the petitioner's company (Hudson Aircraft Products Company) was engaged in manufacturing war materials for use by the armed forces. The Circuit Court in its opinion said of the petitioner's company that it "had secured contracts from the Ranger Aircraft Company for the manufacture of parts for aircraft and had made contracts with manufacturers to produce those parts". In addition, the testimony was undisputed that petitioner's company purchased and supplied the steel from which the parts were ultimately made, that the parts were delivered to the Ranger Aircraft Company under the petitioner's company's trade name, and that the Hudson fulfilled its contracts.[2]

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2 In this bare recital of the facts we are omitting the undisputed testimony of petitioner that in addition to the above he actually helped set up the machinery for doing the work, carefully watched the work being done, inspected the finished products, and had almost daily consultation with the Ranger Aircraft and his own sub-contractors. Apparently the sub-contractors did not have the technical skill to do this work and admitted that they themselves were unable to procure the contracts. Petitioner also financed the purchase of machinery by the sub-contractors and performed many other acts required to expedite and supervise the performance of these sub-contracts.

No one gainsays that petitioner's ingenuity and technical ability enabled manufacturing plant facilities otherwise idle to be put into operation for the war effort. Despite the foregoing the Circuit Court has held that petitioner's company did not manufacture anything and that petitioner was not a manufacturer and thus told a falsehood when he stated that his company manufactured airplane parts. It was this erroneous concept of the meaning of the word "manufacturer" and "manufacture" both in the Circuit Court and the District Court that inevitably led to this erroneous conviction and to the ultimate error in the Circuit Court's statement that the evidence sustained the conviction.

On principle and authority the Circuit Court was in error. This Court held directly to the contrary in *Carbon Steel Company* v. *Lewellyn*, 251 U. S. 501. A modern realistic approach is all compelling to the view that petitioner and his company "manufactured" and were manufacturers of essential war materials. If this be true, the conviction must be reversed.

The Denial of the Motion to Transfer the Cause from North Carolina to New York Was Based upon a Complete Misconception of Law

Prior to trial and upon written affidavit of trial counsel petitioner moved to transfer this cause to the District Court at his home in New York City. In the affidavit of his counsel as well as in the notice of motion it was alleged that the crimes set forth in the indictment were committed in more than one district (4), and that petitioner's only dealings with the draft board, which were involved in this indictment, consisted solely of telegrams or other communications sent by petitioner from New

York through the mails or through the telegraph companies to the local draft board at Greensboro, North Carolina. It was also alleged and entirely undisputed that the petitioner would require a large number of witnesses, all of whom resided in the State of New York and in New York City, in order to be able to establish his defense, and that it was impossible to cover the matters by deposition since his counsel could not know what the government might ask in direct examination.

The District Court denied the motion to transfer and in its opinion said "Rule 21 of Criminal Rules of Procedure does not apply unless the offense was committed in more than one district. *Hardwick* v. *U. S.*, 257 Fed. 505, relied on by defendant is inapplicable. * * * The court is of opinion that the offense, if any, is one committed only in the middle district of North Carolina and that this is the proper venue. *Reass* v. *U. S.*, 99 Fed. 2d 752" (89). The defendant excepted to this ruling and when the case was called for trial renewed the motion to transfer upon the theory that the crime, if any, was committed in New York and not in North Carolina. This motion is set out *in extenso* at pages 10-12 of the petitioner's appendix to his brief in the Circuit Court of Appeals. The motion was denied and an exception taken, the court stating that if it found that it was "without jurisdiction", it would make the proper order (12).

The Circuit Court in reviewing the proceedings in the District Court first held that the crime was committed only in the district where the papers were received—the Middle District of North Carolina. It cited a number of authorities to support this statement. However, the Circuit Court did state that it might fairly be argued that the crime "was begun by the mailing of the papers in New York and concluded when they reached their destination in North Carolina".

There is no doubt that the District Court in denying the first application for a transfer based its denial solely and exclusively on the ground that the crime, if any, was committed in North Carolina and, therefore, the District Court had no jurisdiction to transfer. The same must be said of the District Court's denial of the transfer motion renewed just before the jury was selected, especially since that Court noted on the record that the only point it was considering was the jurisdictional one. Speaking of the latter motion the Circuit Court erroneously said that "as nothing appears to the contrary, the presumption is that the last motion was denied in the discretion of the trial judge".

The record is bare of anything [illegible] this presumption, and as a matter of fact the Circ[illegible]ourt's presumption flies directly contrary to the facts because, as we have already said, the District Court denied the transfer motion when renewed upon the ground of jurisdiction and that alone (12). Rule 21 (b) requires the exercise of discretion by the District Judge. Since there was no discretion exercised by the District Court the result to the petitioner is, that because of an erroneous impression of the law concerning the venue of this crime, he was deprived of his legal right under Rule 21 (b).

Petitioner was a lifelong resident of New York City except for the two month interval he was employed in Greensboro, North Carolina. It was during this interval that he was required to register for the draft. When he returned to New York he promptly notified the Greensboro board to transfer his record to New York where he lived. That board apparently misunderstanding the rules of the Selective Service held that it could not transfer the records and insisted that upon retaining jurisdiction.

A member of the Greensboro board testified, that according to Selective Service rules, whenever any person,

who worked in another state, claimed occupational deferment, his file had to be transferred to the district where he worked or lived; and it was the appeal board in the applicant's district of residence or work which finally determined his draft status and classification. This was actually done in the case of this petitioner. When petitioner filed his first affidavit, which was dated January 10, 1944 (the basis of the first count), the Greensboro board temporarily placed him in a deferred classification while it forwarded the file to one of the appeal boards in New York City for final determination of the matter. The action of that board (the New York City Appeals Board) was all controlling on the Greensboro Board.

The alleged false affidavit was completed in New York City. It related to the nature of petitioner's occupation and activities in New York City, and the document itself set forth, according to Selective Service rules, the place where it was completed.

Petitioner urges that the decisions of both the District and Circuit Courts were erroneous and that as a result of such error he has been deprived of the substantial right of having the trial judge transfer his case pursuant to Rule 21 (b) of the Rules of Criminal Procedure. The result of this error was to subject petitioner to "unfairness and hardship to which trial in an environment alien to the accused exposes him" contrary to the "underlying spirit of constitutional concern" and "constitutional policy" on the subject of venue (*United States* v. *Johnson*, 323 U. S. 273, 275, 276).

It was in New York City, and there alone, that petitioner could produce the witnesses and reconstruct the facts for the jury to see, that his statements in the document under consideration were true. In addition the error was intensified by the persistent questioning of the peti-

tioner by the United States Attorney during the trial, calling specific attention to the fact that petitioner had failed to produce specified witnesses who might corroborate his testimony. (Failure to produce Rowan (145); failure to produce Little (146); failure to produce Lessner (146); failure to produce petitioner's wife (146); failure to produce petitioner's father (147); failure to produce Magrill (147); failure to produce Steinhoff and Ryerson (148).)

"Crap Game"—George Raft (148-150) Improper Use of Alleged Single Incident of Gambling to Impeach Credibility

In charging the jury concerning the testimony adduced from the petitioner on cross examination, over objection and exception, to the effect that on a single instance (the night when he met George Raft in New York City (148-150)) he had engaged in a "crap game" with a number of his friends for about a half hour and had lost some money, the Court solemnly declared:

> "That evidence was admitted and you are so instructed to consider it, solely on the question of his veracity, whether you would believe any statement to which he testified, and it would be improper for you to consider it for any other purpose" (193).

At the time the testimony was offered the Court said almost the same thing (149).

Participation in a single game of chance had nothing to do with the allegations of the indictment nor did it in any way tend to support the government's contention concerning the alleged false statements. The petitioner admitted the incident. Therefore, no question could be raised about

his veracity at the trial. Certainly there was nothing either in the question or the answer to hold one up as a model of iniquity or a master perjurer. Yet the Court told the jury in no uncertain words that they could use this testimony—this admission of a single act of gambling by the petitioner, as the basis for disregarding his entire testimony, and declare him to be a perjurer. (This is directly contrary to the decision of the Court of Appeals for the District of Columbia in *Campion* v. *Brooks Transp. Co.*, 135 F. 2d 652, holding that it was reversible error to admit such evidence on the score of credibility.) Thus it was that the error in the admission of the testimony was magnified a thousand-fold by the instructions to the jury.

We can unhesitatingly state that in New York City no one would ever dare to suggest, that because a person had engaged in a single game of chance with friends that he was, therefore, unworthy of belief or a dissolute character whose veracity could thereby be attacked. As we understand the law, character and reputation are judged by the standards in the community where the petitioner resides and not elsewhere. This very rule is another reason why petitioner's motions to transfer should have been granted.

Questions Presented

1. Did the Circuit Court err in holding that petitioner and his company were not "manufacturers" despite the proof that petitioner's company had contracts for the manufacture of essential war materials from the Ranger Aircraft Corporation; that it performed those contracts; that it supplied the materials; that it risked its capital thereon; that its trade name was affixed to the products; and that petitioner harnessed to the war effort manufacturing facilities that otherwise would have been idle?

2. Did the Circuit Court err in sustaining the denial of a twice made motion to transfer this cause to the place of the petitioner's residence in New York?

3. Did the Circuit Court err in sustaining the Court's charge which permitted a jury to entirely disregard petitioner's testimony given at the trial merely because petitioner admitted that on one occasion he had engaged in a "crap" game with friends?

Reasons for the Allowance of the Writ

1. The decision of the Circuit Court respecting the meaning of "manufacture" is directly contrary to the decision of this Court in *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501.

2. The questions presented respecting venue and transfer of trial, including the application of Rule 21 (b) of the Rules of Criminal Procedure to section 103 of Title 28 U. S. C. embody matters which have not but should be settled by this Court.

3. The erroneous charge on the effect of petitioner's participation in a single instance of gambling with friends authorized the jury to disregard his entire testimony. This is a serious infringement upon personal liberty and permits the destruction of veracity for an act neither wrongful nor immoral. It is thus invested with constitutional concern, and is directly contrary to the decision of the Court of Appeals for the District of Columbia in *Campion* v. *Brooks Transp. Co.,* 135 F. 2d 652.

4. Even if we were to assume that a single act of gambling with friends was an immoral act, nevertheless there is a conflict between circuits as to whether testimony concerning such an act is admissible and could be used as a criterion in the judgment of veracity. The better rule (see *Coulston* v. *United States* (10th Cir.), 51 F. 2d 128, and *Miller* v. *Oklahoma*, 149 F. 330)[3] seems to be that only such wrongful and immoral acts which in and of themselves relate to veracity, for example, fraud or forgery, may be admitted in evidence and used as a guide in determining credibility. In either event this Court ought to finally determine this important question of law.

5. The evidence in any event does not support conviction for any selective service offense.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the case numbered 5608 and entitled in its docket as "*Morris Shurin*, Appellant, v. *United States of America*, Plaintiff-Appellee", and that the judgment of said Court be reviewed

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3 Acts of misconduct, not resulting in conviction of a crime, are not the proper subject of cross-examination to impeach a witness. *Terzo* v. *U. S.*, 9 Fed. 2d 357; *Conner* v. *U. S.*, 7 Fed. 2d 313; *Glover* v. *U. S.*, 147 Fed. 426; *Haussener* v. *U. S.*, 4 Fed. 2d 884; *Lennon* v. *U. S.*, 20 Fed. 2d 490, 494; *Little* v. *U. S.*, 93 Fed. 2d 401, 408; *U. S.* v. *Montgomery*, 126 Fed. 2d 151, 154.

by this Court, and for such other relief as to this Court may seem proper.

Dated: January 6, 1948.

MORRIS SHURIN,
Petitioner,

By HENRY G. SINGER,
Attorney for Petitioner,
16 Court Street,
Brooklyn 2, New York.

HARRY SILVER,
BENJAMIN GLASS,
With him on the Petition.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated: JAN 6 1948

HENRY G. SINGER,
Attorney for Petitioner, and
a member of the bar of this Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

MORRIS SHUBIN,

Petitioner,

—against—

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Statutes Involved

The federal statutes involved are section 11 of the Selective Training and Service Act of 1940 (section 311 of Title 50 Appendix, United States Code); section 103 of Title 28 U. S. C. and Rule 21 (b) of the Rules of Criminal Procedure.

STATEMENT OF FACTS

The Indictment

The petitioner was tried in the United States District Court for the Middle District of North Carolina (Greensboro Division) upon an indictment consisting of three counts. (The petitioner was acquitted by the jury upon the second and third counts and found guilty upon the first count.)

The first count alleged that the petitioner, a person subject to the requirements of the Selective Training and Service Act and registered with a draft board in Greensboro, North Carolina, on or about January 10, 1944, "evaded service in the land or naval forces of the United States in that in occupational classification filed with said board he made a false statement as to his liability for service stating therein he was President-Manager of an establishment manufacturing aeroplane parts, buying tools, running shop and inspecting aircraft, and he then knew the statement to be false as his company had no manufacturing facilities and he did not supervise work done by sub-contractors" (2).

(The second count and third count [upon which petitioner was acquitted] alleged that on March 24, 1945 and June 11, 1945 respectively petitioner made false statements in occupational classification affidavits.)

Petitioner's Motions to Transfer the Action

Petitioner made application before the trial judge for transfer of the action to the Southern District of New York for trial. The affidavit of W. R. Jones Jr. attorney for petitioner, in support of the application showed that the affiant therein had been advised by the United States Attorney that the basis for the indictment consisted solely of correspondence from the petitioner mailed by him in New York (6-7).[4]

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4 The affiant "ascertained that there were numerous transactions made by the defendant with various individuals and firms in New York which are material relative to the truth of the defendant's statements, and that the defendant will need a large number of witnesses who reside in the State of New York and in New York City to give material evidence in respect thereto, and that it will be practically impossible for the defendant to secure the attendance of said witnesses upon the trial in this District" (7).

Petitioner's motion for transfer urged that the crimes alleged in the indictment were committed in two districts, and that in the interest of justice the trial be transferred so that petitioner could present his full defense. The trial judge denied this motion because he held that the offense herein was committed only in North Carolina.

When the case was called for trial, and before a jury was selected, petitioner renewed his motion for transfer, adding as a ground for the motion, lack of jurisdiction by the district court in North Carolina (10, 11). The renewed motion was denied. The court accompanied his denial with the remark that "if I find later that this Court is without jurisdiction there will be an order made"(12).

The Evidence

A. *Petitioner's Affidavit Alleged in the First Count and Its Subsequent Transmittal to a New York Draft Board.*

The Government laid the foundation of its case by introducing in evidence, the petitioner's occupational affidavit dated January 10, 1944. J. V. Morgan, coordinator of Greensboro Draft Boards and custodian of the records of the boards read from this affidavit, as follows:

> "A. Name of Registrant: Morris Shurin. Selective Service Order No. 1673, Age: 31. Local Board No. 2, Guilford County, Greensboro, N. C. Title of present job: Pres. and Manager of Entire Business. Describe duties actually performed: Placing all sub-contracts, buying all tools. Running shop. Inspecting all aircraft work for our Army and Navy planes. Consult on all our work for Ranger aircooled engines. Our contracts total about $600,000 dollars. In the last 60 days, we have shipped $135,000.

Q. What is the date of that?

A. This was received at the local Board on January 10, 1944. On the back of the form they ask the question: Name of company: Hudson Aircraft Products Co., 318 East 39th Street, New York City. Description of the activities of this company: Manufacture of 21 different parts for Army and Navy Planes such as bolts, samper rungs and crankshafts for Ranger Eng. Trainer and Fighter planes. State specifically what proportion of your products currently produced are: (a) for use in the war effort 100%, (b) for civilian use, None. Is expansion or further conversion contemplated in war production? Yes. Number employees now 84" (18-19).

The aforesaid Form 42-A was received in evidence as Government Exhibit No. 3 (26). Likewise received in evidence was a telegram from petitioner to the board which preceded the Form 42-A, although the indictment charges falsity only in the affidavit. (Government's Exhibit 2 (26).)

J. V. Morgan further testified:

"Instructions were issued from Washington to all Local Boards that the Local Board, if a man was working in some other state other than the one he was working in when registering, the Local Board would not actually know whether he was in essential occupation or not, and if at any time a registrant was given a reclassification by the Local Board it must be sent to the state director who would forward it to the state in which the man was working. The director there would forward it to the Local Board in the local district where the man was working. This appeal board

was supposed to review the file and I suppose to make some investigation" (32).

The Greensboro board then transmitted the file to a New York City appeal board. This resulted in a classification for petitioner of "1A" (20). Form 42a thus failed in its objective of obtaining him deferment.

B. ***Testimony Concerning Falsity.***

It was undisputed that petitioner " * * * had secured contracts from the Ranger Aircraft Company for the manufacture of parts for aircraft * * * " (opinion of Circuit Court of Appeals below.

The issue tendered by the indictment thus narrowed down to the question whether petitioner "then knew the statement to be false as his company had no manufacturing facilities, and he did not supervise work done by subcontractors" (2). The Government rests its case upon three witnesses, unfriendly (51) to petitioner, William Olderman, and his sons Bernard and Harry Olderman. Together they operated a brass foundry corporation and a machine and tool subsidiary (43, 44). One (42) or both of these concerns did work as sub-contractor on part of the items which the petitioner had contracted with Ranger Aircraft Company, to manufacture. Their testimony came to this: Petitioner originally asked William Olderman whether the Olderman concerns could take on some of the work (41). William Olderman, who was president of the Olderman Brass Foundry (45) and was registered as doing business as the subsidiary company, permitted petitioner to place his sign "Hudson Aircraft Products Co." upon the outside entrance to the premises, to make the Olderman telephone his own, and stated "Whatever you want to do you can do at our office" (41). William Older-

man admitted that petitioner might have inspected the items "when it was ready to deliver to him" (43).

Although William Olderman attempted to deny that petitioner had advanced any funds to the Oldermans for the purpose of financing production (48) his son Bernard admitted the demand and receipt of $500.00 for such purpose (61). William admitted that he had sued plaintiff, lost the case and was appealing (51).

Bernard Olderman (secretary-treasurer of the foundry (60)) testifying for the Government, admitted that it was petitioner who "furnished steel" to the Oldermans (55). Petitioner's sign on the premises of Olderman was three feet wide and three feet long (66). The Oldermans themselves had been unable to obtain any contracts from Ranger (66, 67). The Olderman business forms and petitioner's were identical in format (Government's exhibits 19 and 20 (60)).

Harry Olderman testifying on behalf of the Government stated that petitioner had the right to be in the manufacturing plant (72, 74) until a disagreement arose (74). Although, at one point Harry Olderman purported to deny that petitioner inspected the parts, he later admitted that "if anything was needed he [petitioner] was there to see that it was gotten" (75) and accompanied Ranger inspectors to the plant and contributed to the technical discussion (76). The witness admitted that one morning petitioner demanded to know where his steel was and that without petitioner's consent the Oldermans had removed the steel for fabrication by others (77).

In addition, Charles Lang, former inspector of Navy material, testified for the Government that Bernard and Harry Olderman, themselves put "Hudson Aircraft" labels on the packages. Petitioner was present several times and spoke to the witness on the telephone several times (81).

Anthony P. Litrento, government agent who arrested petitioner testified that petitioner told Litrento that petitioner did not consider himself a mere broker, and said that on many occasions he would advance money to the sub-contractors to meet their payrolls, to buy materials and buy machinery, so they could make the products he had given them to make (86).

No testimony was adduced by the Government on the score of the petitioner's status respecting his other sub-contractors and no effort was made to prove the charge that he did not "supervise work done by" them. (The only proof offered by the Government respecting the work at Republic was introduction of certain ledger sheets. (Government's Appendix.)

The Olderman testimony indicated that they did only *some* of the work. Other work was done at Republic Machine Tool Company (129).

C. *Testimony by Petitioner.*

Upon denial of petitioner's motion to dismiss, he took the stand in his own behalf. Petitioner was a resident of New York, and had resided there all his life except for a two month interval when he managed a furniture store in Greensboro, North Carolina. It was then that petitioner registered for the draft in Greensboro (91, 92). His family had remained in New York (92) and petitioner had no intention of remaining permanently in North Carolina (92).

Petitioner made lengthy exposition of his acquisition of knowledge and experience in supervision of aircraft part production which enabled him to undertake contracts for the manufacture of parts for Ranger. He had received

expert guidance and instruction from a production consultant, Mr. E. J. Rowan.[5]

Sometime in 1943, petitioner decided to go into business for himself. He went to Ranger Aircraft and offered to produce for them. Ranger accepted petitioner's offer to demonstrate that he could produce these difficult items. Petitioner took Ranger's blueprints, produced acceptable samples at Olderman Brass Foundry and obtained orders for these troublesome items that were bedevilling war production of Ranger aircraft (101-108). (Indeed, a mere reading of petitioner's testimony with its explanatory sidelights is indicative of his technical knowledge of the details of specification, construction and production.)

The Oldermans had admitted to petitioner that they themselves could not handle the job and required petitioner's constant co-operation and assistance (108). Petitioner furnished the steel for the work (109). Twenty-one checks payable to Olderman Brass Foundry, Inc. were marked Defendant's Exhibit No. 3 (113). Petitioner explained the nature of the Olderman suit against him and

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5 A. "The education I got by working with Mr. Rowan was in plant layout, in supervision and in rating and going over every detail of planning a shop, even as far as breaking down a machine and setting up tool and die and reading blue prints and costs and deliveries of every part of an aircraft he could teach me, and he sent me to shops that had been under his supervision and I spent sometimes twelve and thirteen hours a day working and getting things lined up with him, and he sent me to the different aircraft companies with materials and advice that they had asked him for and I delivered it, and I listened and learned everything I could, and everything I had ever learned I learned through Mr. E. J. Rowan.

Q. Was Mr. Rowan at that time consulting and being consulted by different manufacturers?

A. Yes, he was. I think he was consultant to about twenty odd different plants making aircraft production and using his facilities and his knowledge in preparation for the jobs themselves, in preparation for everything and expediting and following up and seeing that everything was like it was supposed to go (94-5).

their non-suit (113-118). Petitioner gave a few examples of how his knowledge of production methods saved the day at Olderman when the Olderman family was set upon pursuing wrong methods (118, 119).

Petitioner discovered that the Oldermans were removing his steel and sending it to Connecticut under sub-contract and protested against such practice (120). Purchase orders from Ranger Aircraft were received in evidence as Defendant's Exhibit 6½ (123).

Indicative of production by petitioner at the plants of other sub-contractors is an order placed by petitioner for 6,000 pounds of steel to be shipped to Republic Machine Tool Corp. New York City (123, 124).

Petitioner was thirty-one years of age on January 10, 1944 (127). He described the serious chronic and progressively worsening ear affliction from which he suffered (125-127). Petitioner felt assured that his ear condition was such that he would not be accepted for induction by the armed forces. Thus he had no need to resort to false occupational statements, and no intention to attempt to evade military service (133).

On cross examination of petitioner, the United States trial assistant launched upon a most prejudicial line of inquiry which aggravated the intrinsic unfairness of a trial in North Carolina concerning evidentiary facts the site of which was exclusively in New York City. When the district court judge denied petitioner's application for transfer of the case to New York, such denial should at least, in all fairness, have purchased for petitioner exoneration from questioning before the jury—who knew nothing of the motion for transfer—as to the reason for the petitioner's failure to produce as witnesses persons who conceivably might have corroborated his testimony.

The United States Attorney, however, apparently could not resist the temptation to put petitioner in the predicament of being chargeable with adverse implications because of the failure of New York witnesses to come to petitioner's defense in North Carolina (145, 146, 147).

Even more serious in potentiality for irredeemable prejudice to petitioner was the Government's attorney's poisonously barbed question,—out of the blue— "Do you know George Raft?" (148) followed by a series of queries as to whether on the occasion petitioner had met George Raft, petitioner had engaged in a crap game (149). Petitioner's objections and exception to this line of inquiry were in vain (149).[6]

Dr. H. C. Cook, called on behalf of petitioner, testified that he was an ear, nose and throat specialist in North Carolina; that he had examined petitioner on the day of trial, and found his ear condition such that in no event would he have been accepted for military service (157); that petitioner was in constant danger of developing meningitis (159). There was no indication to the doctor that the condition was of recent origin (167).

Petitioner renewed his motion to dismiss (170).

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6 Other improper and prejudicial cross examination of petitioner is discussed under Point III *Infra*.

POINT I

The Circuit Court erred in holding that the petitioner's company did not manufacture the items of war production alleged in petitioner's occupational affidavit, and that the affidavit was thus false. (Question Presented 1.)

The Circuit Court wrote, "the statements as to the occupation of defendant contained in the telegram and affidavit were false. The Hudson Aircraft Products Company was not a manufacturing corporation[7] at all but a mere trade name used by the defendant, who had secured contracts from Ranger Aircraft Company for the manufacture of parts for aircraft and had contracts with manufacturers to produce those parts for aircraft and made contracts with manufacturers to produce those parts. He himself manufactured nothing, ran no shop and had no employees".[8]

We respectfully urge that the Circuit Court misconstrued the meaning of the term "manufacture" and that this basic error caused it to lose perspective in appraising in terms of broad veracity, the petitioner's affidavit as a whole.

If we add to the fact as noted by the Circuit Court that petitioner "had secured contracts from the Ranger Aircraft Company for the manufacture of parts for aircraft" the further conceded facts (a) that petitioner had fulfilled those contracts, (b) had furnished to his contractors the steel with which to fabricate the products in accord-

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7 Petitioner at no time stated his company was a "corporation".

8 The indictment makes no reference to number of employees as an item of falsity.

ance with specifications, (c) had risked his capital, (d) his company's trade-mark was placed on the manufactured parts, and (e) that it was his initiative and enterprise[9] which harnessed the Olderman plant[10] facilities (otherwise going to waste) to the war effort and added its output thereto (and apparently that of the Republic company as well)—if we add all this, how can it be said that petitioner falsified feloniously when, using a single word intended to be broadly descriptive of his activities and occupation, he stated that his company manufactured the products in question?

The decision of the Circuit Court below is in direct conflict with that of this court in *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, in which this Court held that a firm which held contracts for the manufacture of munitions was thereby to be deemed a manufacturer of munitions irrespective of who actually fabricated the armaments and that not even the fact that this Court was considering a tax statute, where the party resisting the tax had the right to insist upon a literal definition of terms, could alter such concept.

In *United States* v. *Parfait Powder Puff Corp.* (7th Cir.) 163 F. 2d 1008, 1010, the Court did not hesitate to designate as a manufacturer, a firm which procured the manufacture of a cosmetic upon which its trade-mark was affixed.[11]

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9 The Government moreover failed to put the Oldermans back on the stand to deny petitioner's testimony that it was his skill as a production expert that made it possible for the Olderman plant to function successfully on this work.

10 The Oldermans themselves had failed to obtain Ranger contracts (66, 67).

11 A manufacturer need not own or operate manufacturing facilities. (*State* v. *Clarks*, 64 Minn. 556; *Hendy* v. *Saule*, 11 Fed. Cas. Co. 6,359; *Abeles* v. *Friedman*, 171 Misc. 1042, 14 N. Y. S. 2d 252 (Supreme Court, New York County).)

If, then, the Circuit Court below erred in holding that petitioner's company ("the trade name used by defendant") did not manufacture the parts in question, then the failure of proof of the felonious falsification charged in the indictment becomes manifest and inescapable.

Moreover, the allegation in the first count in the indictment that petitioner in his occupational affidavit (which alone is the basis of the count) said he was the executive head of an *"establishment"* manufacturing aeroplane parts, is not supported by the proof in that nowhere in the occupational affidavit does the word *"establishment"* appear.

The gravamen of the charge of falsity as set forth in the indictment is "that his [petitioner's] company had no manufacturing facilities, and he did not supervise work done by sub-contractors". We respectfully submit that the proof is that petitioner's company did have manufacturing facilities at its disposal. The Oldermans not only put their plant at petitioner's disposal for Ranger work, but by the large outside sign advised the world that the premises were that of "Hudson Aircraft Products Co." If the words of the indictment mean that the petitioner's company did not own manufacturing facilities, it suffices to note that petitioner never stated that the company *owned* manufacturing facilities, and again that such lack of ownership does not deprive the petitioner's company of the right to be deemed a manufacturer—there is no proof that petitioner's company did not *have* manufacturing facilities.

There remains of this count in the indictment only the claim that petitioner's statement was false in that "he did not supervise work done by sub-contractors". The very proof of the volume of work done, taken together with the Government's utter silence as to petitioner's supervision of the sub-contractor Republic, causes the indictment to stand unsupported.

A basic miscarriage of justice occurred when the jury instead of being instructed that petitioner's company was indeed a manufacturer and then directed to view petitioner's incidental statements in that light, was not even given standards and criteria by which it could determine this question for itself. Actually, the Circuit Court has sustained the conviction only upon the erroneous presumption that petitioner was not a manufacturer, and that hence the only issue for the jury was whether he falsified deliberately or misstated facts unintentionally. We respectfully urge that this Court review the serious misconception of the work "manufacture" which may well find further repercussions not only in the field of Selective Service but many other and unrelated branches of law as well.

POINT II

The Circuit Court erred in upholding the District Court's denial of petitioner's application for removal of the case from North Carolina to New York, and in affirming petitioner's conviction upon the evidence respecting the venue of the offense herein.

(Question Presented 2.)

The Circuit Court's entire discussion of the question of venue herein, we respectfully submit, is steeped in fundamental error which ignores the underlying spirit of the constitutional concern with venue, and veers interpretation of organic law on this vital subject in a direction derogatory to basic civil rights.

The Circuit Court erred in holding that it was not necessary for it to decide whether this case was transferable under Rule 21 (b) of the Rules of Criminal Procedure.

This case was indeed transferable under the aforesaid rule as one cognizable under section 103 of Title 28 of the U. S. C. in that the offense, if any, was committed in more than one district. The Circuit Court erred further in holding that the District Court had denied the application for removal in the exercise of discretion, when the record shows that the judge denied it specifically on the ground that he had *no power* to transfer the case. Finally, the Circuit Court erred in holding that the interests of justice did not require the transfer of the case and that if the district court judge had granted the application for removal, such decision would have constituted an abuse of discretion. This final error is important for the reason that the Circuit Court assigns this alleged lack of intrinsic merit to petitioner's objection as a ground for denying him the right to a new trial.

This Court has held that in Selective Service Act violations "the statute does not indicate where Congress considered the place of committing the crime to be" and that "the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it. (*United States* v. *Anderson,* 328 U. S. 699, 703.)

This Court has held further that construction of venue, if at all possible, "should go in the direction of constitutional policy even though not commanded by it". (*United States* v. *Johnson,* 323 U. S. 273, 276.) In the same opinion this Court declares that such "constitutional policy" and "underlying spirit of constitutional concern" (p. 276) on the subject of venue[12] is based upon " • • • the unfairness and hardship to which trial in an environment alien to the accused exposes him" (p. 275).

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12 Article 3, sec. 2, cl. 3 and 6th Amendment to the Constitution.

Indeed, Rule 21 (b) of the Rules of Criminal Procedure was adopted to correct the unfairness and hardship resulting from the operation of section 103 of Title 28 U. S. C. permitting the Government unrestricted choice of the district of trial when an offense is begun in one district and completed in another. (*United States* v. *National City Lines,* 7 F. R. D. 393, citing *Hyde* v. *Shine,* 199 U. S. 62, 78, in which this Court disapproved the practice, and citing the following authorities in support of the proposition that Rule 21 (b) of the Rules of Criminal Procedure was promulgated to correct the aforesaid evil. Holtzoff, Federal Criminal Procedure, 37 Journal of Criminal Law and Criminology (1946) pp. 109, 116; George Z. Medalie, Federal Rules of Criminal Procedure, New York Institute (1946, pp. 274, 275).

Approaching consideration of venue of the alleged offense herein and transfer of trial, with these precepts in mind, it appears that (1) it is indeed necessary to determine whether the offense was "begun" in New York, and (2) that the facts in the case compel the determination that the offense was indeed cognizable in the district court in New York.

The following considerations compel the conclusion that the offense was begun or at least partially committed in New York:

1. It is not the filing of a false statement or certificate with a draft board but the making of the statement or certificate which is rendered an offense. Thus the offense, if any, has certainly been begun when the statement or certificate is executed and put into the mails for delivery to the draft board. (*United States* v. *Downey,* 257 F. 366; *Bridgeman* v. *United States* (9th Cir.) 140 Fed. 577; *United States* v. *Wright,* Fed. Cas. No. 16,773.)

2. Form 42-A, the occupational affidavit in question herein, itself indicates that the Government considered the making of such certificate complete in the place where it is executed, in that it requires a statement (19) as to the place where the "form was completed" (Government's Exhibit 3) and requires that such place be the one where communications respecting it be addressed.

3. If, however, the Southern District of New York be not deemed the place where the alleged offense was "begun" (section 103 Title 28 U. S. C.) then it follows that a realistic construction of venue requires that the Eastern District of New York be deemed the place where the offense was "completed". The first and only draft board that had authority, under the selective service regulations (as testified to by the Government witness, Morgan (32)), actually to grant deferment to the petitioner based upon his statement or certificate was the New York board to which the petitioner's file was transmitted. The Greensboro draft board's purported deferment of petitioner, it is clear, was no more than an interim notation pending transmittal of the matter to New York and its determination there. Realistically viewed, the offense herein should not be deemed to have been "completed" (Title 28 sec. 103, U. S. C.) until the full process of transmittal to North Carolina, and the further transmittal from North Carolina back to New York for determination by the New York appeal board.

Certainly, the petitioner's statement must be deemed made to the appeal board in New York where it could be operative and effective to grant him actual deferment,

no less than to the draft board in Greensboro, which was merely an agency of transmittal in this particular case.

In *United States* v. *Downey,* 257 F. 366, it was held that a district court has jurisdiction of a prosecution for fraudulent procurement of payment of a reward by the United States, though the fictitious claim or voucher were made in the district and transmitted to an officer in another district. To the same effect, see *Bridgeman* v. *United States* (9th Cir.) 140 Fed. 577.

Our case, however, as we have observed, features the additional vital element that the state in which the document was completed, executed, and mailed, is also the state to which the form was shuttled back to complete the processing.

Thus, we urge, the district court erred when it denied petitioner's application for transfer upon the ground that the offense was committed only in North Carolina. The district judge having expressly stated the ground of his decision as one of *law,* the Circuit Court was unwarranted in indulging utterly fictitious presumption that the judge decided the renewed motion as a matter of *discretion.* There is absolutely no basis for assuming that the judge reversed his recorded ruling on the *law.* Thus the situation is radically different from that which exists when the operation of the court's mind is not on record and where it can perhaps then be presumed that it acted in accordance with correct construction of law.

In our case, the record shows, that the district judge, made no change whatever in his ruling, that in fact he was not even considering the renewed motion except to the extent that petitioner now urged a new ground, namely, that the crime occurred only in New York. As to such new ground, the court denied the motion with the reserva-

tion that if he changed his mind as to his lack of jurisdiction, he would make an order to that effect (12).

Possibly, the aspect of the Circuit Court's decision on the question of venue and transfer that most urgently calls for this Court's review is its lack of appreciation of the hardship and unfairness of a trial in an alien environment, lack of awareness of the very factors that constitute the underlying spirit of "constitutional concern" and which dictated "constitutional policy" respecting place of trial.

In our case, not only was the petitioner tried in an alien environment, but in a court which lacked the power to compel the attendance of the persons qualified to serve as witnesses on defendant's behalf,[13]—the New York witnesses who could, compositely, truly detail his occupational activities, and depict the role he played in facilitating the flow of production in the high priority and vital armament items for the manufacture of which his company assumed solemn contractual responsibility. Not merely, then, was the environment of trial alien, but, all of the controverted evidentiary facts were available for elicitation at trial by compulsory process, only in a distant jurisdiction. The result can only be that petitioner had no more than the shadow of a trial. (*United States* v. *National City Lines*, 7 F. R. D. 393, *supra.*)

The Circuit Court appears to hold drastically against petitioner the delay in making the motion for transfer and after the case had been set for trial in North Carolina. Indeed, the sequence of events fortifies the merits of petitioner's position. It should not be held against him that

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13 The United States Attorney took full advantage of petitioner's failure to produce witnesses for, on cross examination, he inquired into the failure to produce Rowan (145), Little (146), Lessner (146), petitioner's wife and father (146-7), Magrill (147) and Steinhoff and Ryerson (148).

originally his North Carolina counsel had hoped to be able to protect petitioner's interests in counsel's home jurisdiction. However, as counsel explained in his affidavit (7), he made a trip to New York to prepare the case for trial and it was then that he realized the hopelessness of being able to present a full defense in North Carolina.

Thus, the Circuit Court erred when it held that it was unnecessary to determine the point as to whether the alleged offense had been committed in part in New York. It was necessary to determine it, and to remand the matter to the district court so that the petitioner might have the benefit of the provisions of Rule 21 (b) of the Rules of Criminal Procedure. The Circuit Court, we respectfully submit, was definitely wrong in holding that it would have been an abuse of discretion to transfer the case to New York. (*Hyde* v. *Shine*, 199 U. S. 62, 78, *supra*.)

The Circuit Court's entire discussion of the subject of venue and transfer in this case, we respectfully submit, should be reviewed by this Court.

POINT III

The Circuit Court erred in holding that the jury was entitled to consider the fact that petitioner had engaged in a "crap game" with friends as bearing on his credibility.

(Question Presented 3.)

Referring to the petitioner's testimony adduced on cross examination over objection and exception, that he had met George Raft (the motion picture actor) at a dinner party and engaged in a "crap game" with friends on the occasion of such meeting (148, 149), the Trial Court charged the jury that they were to consider such evidence "on the

question of his [petitioner's] veracity, whether you would believe any statement to which he testified, * * *" (193).

Since neither meeting George Raft nor participating in a "crap game" with friends can be characterized as a wrongful or immoral act, it follows that both the Circuit Court and the District Court erred in holding that such occurrences had bearing upon the petitioner's veracity and upon whether the jury would believe *any* statement to which petitioner testified. (*Coulston* v. *United States* (10th Cir.) 51 F. 2d 178.) "No authority has been cited and we have found none indicating that * * * an occasional act of gambling (in or out of a gambling joint) * * * is such conduct that may be shown to lessen the credibility of the participant" (*Campion* v. *Brooks Transp. Co.* (135 F. 2d 652). The Court held it was reversible error to admit such evidence.

Indeed even if the acts in question were to be deemed wrongful and immoral, the decision of the Fourth Circuit herein would be in conflict with that of the Tenth Circuit, in *Coulston* v. *United States,* 51 F. 2d 178, *supra,* approved by Wigmore on Evidence as noted in the said *Coulston* case) and that of the Eighth Circuit in *Miller* v. *Oklahoma.* in 149 F. 330, holding that only such specific acts or conduct as fraud, forgery or perjury, pertaining to veracity, as distinguished from specific matters bearing solely on general character may properly be a subject for inquiry on cross examination. On the same subject see cases cited under Footnote "3" of Petition.

The decision of the Fourth Circuit herein, in any event is directly contrary to that of the Court of Appeals for the District of Columbia in *Campion* v. *Brooks Transp. Co.,* 135 F. 2d 652, *supra.*

Participation in a single game of chance by an individual should not entitle a jury to reject his testimony.

Certainly, in New York City, of which petitioner was a life-long resident, participation in a game of chance is not deemed to be in derogation of either the character or the veracity of the participant. For purposes of effect on credibility, the witness' conduct must be assayed with reference to the customs and habits of the community in which he lived (70 Corpus Juris 831).

Thus, the Courts below erred on the dual grounds that (1) interrogation of the petitioner was permitted as to conduct, which as a matter of law is not immoral or wrongful, and certainly not deemed such in the petitioner's local environment, and (2) that in no event is veracity involved at all.

It was not only with respect to this single gambling incident that the United States Attorney effectively destroyed every possibility of petitioner receiving a fair trial. Quite contrary to every established principle of what we deem to be respectable cross-examination, government counsel directly charged petitioner with having had meritricious relations with his present wife while he was married to his first wife. The examination in this connection was quite clever. It started off innocently with the routine interrogation concerning petitioner's marital status at the time he first registered for the draft in 1940, then went to petitioner's status on June 6, 1941, when he signed his "questionnaire". He was then asked:[14]

> "Q. So you were not living with Irene when you left Olderman?" (Irene is petitioner's second wife.)

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14 Our quotations are from the Government's typewritten appendix in the Circuit Court. No page references are made because at the time this brief was prepared the writer did not have the printed matter in this court.

The question was not answered because the court interrupted with another question. However, the United States Attorney went on to inquire about the divorce of petitioner's first wife as follows:

"Q. Who got the divorce you or Mildred?

Defendant Objects—Overruled—Exception.

A. Mildred did. (Petitioner's first wife.)
Q. Where were you living when she got the divorce?
A. 66 Park Avenue, New York, or 50, I don't remember offhand.
Q. Where was Irene Lindenauer living?"

Defendant Objects—Overruled—Admitted On Question of Impeachment—Defendant Excepts.

Apparently there was no answer to the question. Then the examination went on as follows:

"Q. When the Hudson Aircraft Company was formed who owned it?
A. Irene Lindenauer.
Q. She is your present wife?
A. That's right.
Q. *I ask you if the divorce action brought by your first wife was not based on your relations with your present wife?*

Defendant Objects—Sustained.

A. Absolutely not."

This type of cross-examination, we say with a great deal of regret, was certainly "after the most approved

police court methods" (*Apt.* v. *United States,* 13 F. 2d 126, 127). Certainly it was not in good taste in a district court in the United States where the issue involved had nothing whatever to do with the defendant's marital or extra-marital relations. However, the United States Attorney was not satisfied. He continued to press the issue and ask:

> "Q. You and she [petitioner's second wife] were associating a year before you were divorced?"
>
> "Mr. Jones: What do you mean by associating?
> Mr. McNeill (Assistant United States Attorney): He said he went there for the purpose of filing a certificate.
>
> Defendant Objects—Overruled—Exception.
>
> Q. Is that right?
> A. Yes sir."

On must indeed be blind to overlook what seems to be a deliberate twisting of a legitimate question to a distinctly illegitimate purpose. If the information really required was whether petitioner was associated in business with his second wife before he married her, it was easy to ask it in plain, straightforward language. However, that was not the covert purpose here. The United States Attorney wanted to get before the jury, as he had already done by the direct question, the none too gentle insinuation that there was something morally reprehensible between petitioner and his second wife before their marriage.[15]

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15 In *Ingram* v. *United States,* 9th Cir., 106 F. 2d 683, the Court held that it was reversible error to permit impeachment of a defendant as a witness by cross-examination directed to claimed improprieties in marital relationship. See also, *United States* v. *Montgomery,* 3rd Cir., 126 F. 2d 151, 154 *supra,* and *Conner* v. *United States,* 9th Cir., 7 Fed. 2d 313, 314.

The inquiry into credibility and cross-examination was not created for the purpose of destroying reputation. Petitioner had called no character witnesses. Strictly speaking his character was not in evidence. The only issue raised was whether he was worthy of belief. There was no proof that he had ever been convicted of a crime. No suggestion was ever made or any proof offered that a judgment in fraud had been found against him. The prosecutor then created a feeling of animosity and hatred against petitioner by stirring the emotions of the members of the jury to the point where they would be influenced against petitioner because he admitted that at one time "he had shot crap" on the same night that he met a famous motion picture star George Raft, and that he unfortunately was divorced from his wife and married a woman with whom he apparently was associated in some business before their marriage.

It can hardly be questioned that all this was error so prejudicial as to require a new trial.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

HENRY G. SINGER,
Attorney for Petitioner.

HARRY SILVER,
BENJAMIN GLASS,
With him on the Brief.

INDEX

CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 521

MORRIS SHURIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 309–314) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 10, 1947 (R. 315). On December 8, 1947, the Chief Justice extended the time for filing a petition for a writ of certiorari through January 9, 1948 (R. 318). The petition was filed January 9, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether material statements made by petitioner to his local draft board were false.

2. Whether the offense of filing a false report with the draft board was an offense committed in more than one district, because the report was mailed from New York to the draft board in North Carolina.

3. Whether it was error to admit evidence of gambling by petitioner on the issue of credibility and, if so, whether the error was harmless.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act, 54 Stat. 894, 50 U. S. C. App. 311, provides:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall know-

ingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act un-

less such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

STATEMENT

Petitioner was indicted in the United States District Court for the Middle District of North Carolina, in three counts charging evasion of military service by making three different false statements to his local board as to his liability for military service (R. 1–3). He was convicted on the first count and was sentenced to imprisonment for a term of eighteen months (R. 198). Upon appeal to the circuit court of appeals, the judgment was affirmed (R. 315).

The evidence in support of the judgment of conviction may be briefly summarized as follows:

On October 16, 1940, petitioner registered for the draft with Local Board No. 2, Greensboro, North Carolina (R. 13).[1] On May 22, 1941, he filed his questionnaire in which he stated his occupation as that of a law clerk (R. 14). After having been deferred on occupational and dependency grounds, petitioner was reclassified 1–A and on January 8, 1944, he was issued an order to

[1] At that time petitioner lived and worked in Greensboro, North Carolina (R. 13). He later moved to New York (R. 15).

report for induction on January 19, 1944 (R. 16–17). On January 10, 1944, the local board received a telegram from petitioner, which, together with Form 42–A (*infra*), is the basis for the charge in count 1 of the indictment. The telegram stated (R. 17):

> Received induction orders today for January 19th, 1944. Am in complete surprise at not being reclassified from 3A which I received on April 14, 1943 to 1A so that may have the civil right to appeal local board here cannot figure it out unless some mistake has been made. I would certainly be in receipt of any mail had you sent me a reclassification and would have appealed directly to you without further difficulty as I am now president of a defense plant making aeroplane parts with orders from the Army and Navy. Form 42A will follow. Please wire collect your decision.

On January 13, 1944 the Form 42–A, to which reference was made in the telegram, was filed by petitioner (R. 18). Petitioner's statements on the Form 42–A, as described at the trial, were as follows (R. 214–215):

* * * * *

> A. Name of Registrant: Morris Shurin.
> Selective Service Order No.: 1673; Age: 31.
> Local Board: No. 2, Guilford County, Greensboro (city), N. C. (state).
> Title of present job: Pres. & Manager of Entire business.

Describe duties actually performed: Placing all sub-contracts. Buying all tools. Running shop. Inspecting all aircraft work for our Army and Navy planes. Consult on all our work for Ranger aircooled engines. Our contracts total about $600,000 Dollars. In the last 60 days, we have shipped $135,000.

Q. What is the date of that?

A. This was received at the Local Board on January 10, 1944.

On the back of the form they ask the question:

Name of Company: Hudson Aircraft Products Co., 318 East 39th Street, New York City.

Description of the activities of this company: Manufacture of 21 different parts for Army and Navy. Plans such as bolts, damper rings, and crankshafts for Ranger Eng. Trainer and Fighter planes.

State specifically what proportion of your products currently produced are: (a) for use in the war effort: 100%. (b) for civilian use: None.

Is expansion or further conversion contemplated in war production? Yes.

Number of employees now: 84.

Q. Read the last paragraph.

A. The last question that applied to him was the number of employees now, and he states 84.

Q. Wasn't that executed by Morris Shurin?

A. He says: "This form was completed

at the plant or office of the company located at Hudson Aircraft Prod. Co., 318 E. 39th Street, NYC, and all correspondence relative to this affidavit should be so addressed.

"I, Morris Shurin, do solemnly swear (or affirm) that I am President and Manager of the above named company, and that the foregoing statements are true to the best of my knowledge and belief." It was signed Morris Shurin and "subscribed and sworn to before me this 10th day of January 1944."

On the basis of the representations made to the local board in the telegram and the Form 42–A, the board reclassified petitioner on January 24, 1944, into II–A, as one engaged in an essential occupation (R. 19). Thereafter, on the basis of similar representations (R. 22, 23, 25) petitioner retained a deferred classification on occupational grounds until September 24, 1945, when he was deferred as a person over 30 years of age (R. 26).

Petitioner's representations concerning his occupational activities were based primarily on his relationships with the Ranger Aircraft Company and the Olderman Brass Foundry and the Olderman Machine and Tool Company. It was undisputed that beginning in 1943 petitioner obtained various subcontracts from Ranger for the manufacture of aircraft parts (see R. 102–107) while using the trade name Hudson Aircraft Products Company, which had been registered in

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his wife's name (see R. 258). The subcontracts were obtained on the basis of petitioner's arrangements with the Olderman firms. (See R. 96–99.)

The Olderman firms had been engaged in the manufacture of brass equipment and petitioner had worked for them as a tool stock boy in the latter part of 1942 (R. 225, 226–227). In 1943, petitioner and the Olderman firms entered into an arrangement whereby petitioner would obtain subcontracts from Ranger and the Olderman firms would manufacture the products. (See R. 228.) Petitioner had no office or plant facilities, so he was permitted to use the Olderman's telephone facilities and their office. Later he was permitted to place a sign with his trade name over the door to the Olderman plant so that trucks from Ranger would know where to deliver the raw materials (R. 228).

Under the arrangement,[2] Ranger supplied the raw materials to Olderman (R. 228) and picked up the finished product (R. 229). Petitioner paid Olderman for the products they manufactured (R. 229). Petitioner had no access to the Olderman plant where the manufacturing was done, except after the process was completed and the goods were to be inspected (R. 228). He did not supervise work done in the plant under the Ranger sub-contracts (R. 229); the finished products were inspected by a Navy inspector (R.

[2] The total business between petitioner and the Oldermans amounted to sixty or seventy thousand dollars (R. 233).

230). Petitioner had no employees or payroll of his own (R. 238). He did not furnish Olderman with raw materials,[3] tools, machinery, or investment capital (R. 236, 241). One official of the Olderman plant testified that petitioner came to the Olderman plant about once each week and never remained for more than half an hour (R. 241).

In a statement to an F. B. I. agent petitioner admitted that he had no manufacturing facilities of his own and that his modus operandi was to subcontract his work to manufacturers who did have facilities; that Hudson Aircraft Products Company was a trade name and he was its sole owner; and that he had no employees (R. 252).

ARGUMENT

1. It is plain from the evidence at the trial that petitioner was a contract agent who obtained subcontracts from a prime contractor and turned them over to others who had manufacturing facilities for actual production of the products. Indeed, he does not deny this. Instead his only claim seems to be that in addition to getting the contracts he furnished the manufacturer services as an expediter; he furnished scarce raw materials; and he furnished necessary cash advancements (see R. 108–109). But even if his testimony is assumed to be true, the statements which he made to the local board were false. Petitioner

[3] Ranger furnished the raw materials (R. 228, 235–236).

did not tell the local board that he was a contract agent who furnished various services to manufacturers. On the contrary, he told the board that he was the President and Manager of a firm that manufactured 21 different parts for Army and Navy planes; that his duties included "buying all tools," running the shop, and inspecting all the "aircraft work for our Army and Navy planes"; and that he had 84 employees (R. 17–19). Petitioner had no employees; he did not buy tools; he did not have a plant in which he manufactured plane parts; and he did not "run the shop" for he was not even permitted in the Olderman's shop.

The short of the matter is that the local board was led to believe that petitioner was an essential producer of plane parts, while in fact this work was performed by the Olderman firm. The board was never informed of petitioner's true function. If it had been, the board might not have been willing to grant him an occupational deferment.

Petitioner's effort to escape the impact of the plain facts by urging (Pet. 3–4, 9–10, 23–26) that in its broadest sense "manufacture" includes activities such as his is beside the point. Petitioner made specific representations to the local board as to his activities, and these were undeniably false, regardless of whether petitioner was or was not a manufacturer.

2. Petitioner also contends (Pet. 26–32) that the district court erred in not transferring his

case for trial to the District Court for the Southern District of New York, where he then resided. His reliance is on Rule 21 (b) of the Federal Rules of Criminal Procedure, which provides:

> OFFENSE COMMITTED IN TWO OR MORE DISTRICTS OR DIVISIONS. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

The rule permits a transfer of the case for trial where it appears from the indictment or a bill of particulars that the offense was committed in more than one district, and it provides that the transfer shall be "to another district or division in which the commission of the offense is charged." In this case count 1 (R. 1–2) of the indictment charges that "in the Middle District of North Carolina" the defendant evaded military service in that he made false statements to the board in an occupational classification affidavit. There was no bill of particulars.[4] It does not

[4] If, notwithstanding the allegation of the indictment, petitioner believed that the offense was committed in New York, too, he could have ascertained the facts bearing on this question by moving for a bill of particulars, and then he would

appear from the indictment that the offense was committed in any district other than the district in which petitioner was tried, or that there is any other district to which the case could be transferred. It is plain, therefore, that Rule 21 (b) did not authorize the transfer which petitioner so belatedly sought. (See R. 312.)

In addition to this factor, petitioner also has failed to establish that the offense of evading military service by filing a false statement with the local board is committed in any district other than that where the local board is situated. We agree with the view of the court below (R. 312–313) that the offense occurred when the statements were filed and this took place only in the Middle District of North Carolina. Contrary to petitioner's assumption, the Constitution does not give a defendant a right to be tried where he lives;[5] the right is to be tried in the state and district where the crime occurred. Petitioner enjoyed that right in this case.

3. Petitioner's third contention (Pet. 32–34) is that it was error to permit the Government to show in cross-examining him that he once attended a dinner party at which eight or ten

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have been in a position to move for a transfer of the case and the court would have had a basis for knowing whether the offense was committed in more than one district.

[5] The right to subpoena witnesses (Rule 17 (a) (e)) and the right to obtain depositions (Rule 15) fully enabled petitioner to obtain witnesses from New York, where he lived, if he wanted their testimony.

friends, including one George Raft, were present, and at which the guests engaged in a gambling game for about half an hour (R. 148–150). The evidence was admitted solely on the issue of petitioner's credibility and the jury was so instructed (R. 149, 193).

We agree with petitioner and with the view expressed in *Campion* v. *Brooks Transportation Co.*, 135 F. (2d) 652, by Chief Justice Vinson speaking for the Court of Appeals for the District of Columbia, that evidence of occasional participation in a game of chance is not probative on the issue of the witness' credibility. But the error is not one, we submit, which entitles petitioner to a new trial.

The trial lasted five days and the incident in question consumed no more than a minute or two. Certainly there was nothing prejudicial in the jury's knowing that petitioner attended a dinner party at which a movie actor was present. And it may be seriously doubted that in these times when even churches conduct bingo games and other such games of chance as fund-raising devices that the jury would be prejudiced against petitioner because he once gambled for half an hour. Indeed, the fact that the jury acquitted petitioner on the second and third counts of the indictment which were supported by the same evidence which supported the first count suggests that, instead of being prejudiced against petitioner, the jury tempered justice with mercy.

This is not a case in which the evidence was close and the scales may have been tipped against the defendant by the erroneous evidence. Here, the basic facts are undisputed. The only question was whether the false statements were made for the purpose of evading military service. The inference against petitioner is so compelling that it is well-nigh impossible to believe that if the disputed evidence had not been received, the verdict would have been any different.

4. There is no merit to petitioner's argument (Pet. 34–37) that he was prejudiced by an asserted suggestion from the prosecuting attorney that petitioner had had meritricious relations with a young lady whom he later married. There was testimony at the trial that petitioner, while married to his first wife, had established the Hudson firm and filed a trade-name certificate in the name of one Irene Lindenauer (R. 263–264). In the course of cross-examination in which petitioner explained that he had been divorced by his first wife and had married his business associate, the following occurred (R. 258):

> Q. When the Hudson Aircraft Company was formed, who owned it?
>
> A. Irene Lindenaur.
>
> Q. She is your present wife?
>
> A. That is right.
>
> Q. I ask you if the divorce action brought by your first wife was not based on your relations with your present wife?
>
> Defendant objects. Sustained.

A. Absolutely not.

Q. You did not have any connection with Hudson Aircraft until you married Irene?

A. That is not true.

Q. How long had you and she been engaged under the trade name of Hudson Aircraft Products Company until you married her?

A. I believe I went with her when she filed a certificate in 1943.

Q. That was before you got your divorce?

A. That is right.

Q. You and she were associating a year before you were divorced?

Mr. JONES: What do you mean by associating?

Mr. MCNEILL: He said he went there for the purpose of filing a certificate.

Defendant objects. Overruled. Exception.

Q. Is that right?

A. Yes, sir.

Assuming that the question whether petitioner's divorce resulted from his relations with his second wife was improper, the court did the only thing it could do by sustaining petitioner's objection to it. By answering the question even though he was not required to and denying that the divorce was attributable to the ground suggested, petitioner removed whatever sting there could have been in it. Similarly, the suggestion that the prosecuting attorney's use of the word "associating" carried the innuendo of illicit as-

sociation is rebutted by the prosecutor's statement at the time showing that he referred to business associations. It requires considerable reading between the lines to spell out from this that the jury were told that petitioner and his second wife had immoral relations before their marriage.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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